Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1579

JOHN CHARTER, IV.

and

LYNDA ANN KEELEY,

Petitioners,

vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, FOURTH DISTRICT

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, FOURTH DISTRICT

PETITION FOR CERTIORARI

INTRODUCTION

The Petitioners, John Charter, IV. and Lynda Ann Keeley, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals, Fourth Appellate District, Highland County, Ohio, filed September 20, 1978 and the Order of the Supreme Court of Ohio entered January 17, 1979, overruling Petitioners' Motion for Leave to Appeal and dismissing, sua sponte, such appeal.

OPINIONS BELOW

The opinions and entries of the Court of Appeals for the Fourth Appellate District of Ohio and the Court of Common Pleas for Highland County, Ohio, appear as Appendix A. No opinion was rendered by The Supreme Court of Ohio.

JURISDICTION

The judgment of the Court of Appeals, for the Fourth Appellate District of Ohio was filed October 10, 1978, overruling Petitioners' assignment of error and affirming their conviction in the Court of Common Pleas of Highland County, Ohio. On January 17, 1979, The Supreme Court of Ohio overruled Petitioners' Motion for Leave to Appeal and dismissed said Appeal.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

(1) Does a warrantless and unauthorized police search and seizure raise Fourth Amendment implications when such search and seizure exceeds the scope of an initial private search?

(2) Does a police seizure of contraband under the "plain view" exception raise Fourth Amendment implications when the evidentiary value of the discovered contraband is not apparent to the officer?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions, federal statutes and state statutes which are involved are as follows, and are contained in Appendix B herein:

> United States Constitution, Fourth Amendment, made applicable to the states by the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643, 81 S. Ct. 1684 (1961);
> 28 U.S.C. § 1257 (3);
> Ohio Revised Code § 2925.03 (A) (2) & (6).

STATEMENT OF THE CASE

The facts disclosed that on the evening of February 19, 1977, Petitioners checked into the Greystone Motel in Highland County, Ohio, and paid in advance for one night's lodging. The next morning, at approximately 11:30 A.M., Edgar Postel, the motelkeeper, went to their room for the purpose of stripping the linens from the bed. Upon entering, he observed a yellow plastic bag, which he recalled seeing on the previous night in the possession of Petitioner Keeley, which had been left behind. He believed the bag was not intended to be left and he laid it aside for evaluation when he had a little more time.

Thereafter, he took the bag to the laundry room where he surveyed the contents finding a variety of fresh fruit, cereal and a container of maple syrup. At the bottom of the bag he saw a wrapped up plastic bag of a bundle of white material. Believing it to be powdered milk, but unsure of its nature, he therefore tasted it. Still unable to identify the material he repacked the bag in its original arrangement and called the Highland County Sheriff's office indicating that he may or may not have found something of interest to them.

In the interim, between the call to the Sheriff and the arrival of the responding Deputy Ayres, Petitioner Keeley twice called the Greystone Motel inquiring about the yellow bag and informing Mr. Postle that she was returning to pick up her bag. Mr. Postle told her that it was okay.

When Deputy Ayres arrived, Mr. Postel related the details to him and explained that Petitioner Keeley was returning to get her bag. Nevertheless, Deputy Ayres, without a search warrant, took the bag and removed and examined the contents. When he got to the bottom of the bag he saw a bag containing some sort of white substance which he could not identify. He then removed one of the small white packages in the bundle to take it to see what it was and replaced all the remaining items back in the bag the same way he had found them. He then instructed Mr. Postle to return it to Petitioner Keeley when she returned to claim it. Deputy Ayres then left the motel and drove to the Sheriff's department for the purpose of field-testing the white substance he had seized from the bag to determine what the nature of the substance was. Subsequently, following analysis, he suspected the substance to be cocaine.

Meanwhile, Petitioner Keeley reappeared at the motel and reclaimed her yellow plastic bag. She then proceeded to the airport. Approximately one (1) hour after Deputy Ayres seized the small package, he requested over the police radio that the Petitioners be stopped at the airport. When the deputies arrived, the Petitioners' airplane was stopped and they were taken into custody. Upon arrival at the Sheriff's office, Petitioners were searched and placed in jail. No contraband was found on either Defendant.

Deputy Cooper was then dispatched to the Bureau of Criminal Investigation with the substance obtained at

the motel by Deputy Ayres, for the purpose of chemical analysis. At the Bureau, the substance was analyzed as cocaine. An application for a Search Warrant to search the aircraft was made by Deputy Ayres, and was quickly granted. Several officers then returned to the aircraft and executed the search warrant. Although the plastic yellow bag was seized, there was no cocaine therein. The remainder of the cocaine was not located until the next day, when it was found in the Sheriff's office between a radio console and wall.

The Petitioners were subsequently charged and indicted with Knowingly Possessing and Transporting Cocaine in violation of Ohio Revised Code §§ 2925.03 (A) (6) and 2925.03 (A) (2). The issues sought to be reviewed herein were presented to the trial court in a Motion to Suppress Evidence on May 9, 1977. From the testimony and evidence submitted it was apparent that the warrantless search and seizure of contraband was violative of the Fourth Amendment and not excepted under the "plain view doctrine" or any other exception. Nevertheless, the trial judge overruled the Motion. (Entry appears in Appendix A)

Thereafter, on June 24, 1977, the Petitioners, pursuant to plea negotiations, entered No Contest pleas to the violation of Ohio Revised Code § 2925.03 (A) (6), thereby protecting their right to appeal the constitutional issues. These issues were next raised as the assignment of error presented to the Court of Appeals for the Fourth Appellate District of Ohio. The majority, in a split decision, found that since the initial search was by a private person, the subsequent warrantless search and examination by the police did not render the evidence inadmissible. Additionally, the majority held that whether or not the officer had probable cause to seize the one packet was immaterial since they ruled that the Fourth Amendment was

APPENDIX A

OPINIONS AND JUDGMENTS BELOW

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	)	1979 TERM
	)	To wit:
City of Columbus.	)	January 17, 1979

No. 78-1469

STATE OF OHIO,

Appellee,

vs.

JOHN CHARTER, IV, ET AL.,

Appellants.

APPEAL FROM THE COURT OF APPEALS
for Highland County

This cause, here on appeal as of right from the Court of Appeals for Highland County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Highland County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....

..... Clerk

..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,	)	1979 TERM
	)	To wit:
City of Columbus.	)	January 17, 1979

No. 78-1469

MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Highland County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Finn, Sirkin & Pinales.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this .... day of ..... 19....

..... Clerk

..... Deputy

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

No. 348

STATE OF OHIO
Plaintiff-Appellee

vs.

JOHN CHARTER, IV and
LYNDA ANN KEELEY
Defendants-Appellants

OPINION

(Filed September 20, 1978)

Rocky A. Coss, Hillsboro, Ohio, and Ronald J. O'Brien, Columbus, Ohio, for appellee.

H. Louis Sirkin, Cincinnati, Ohio, for Appellant.

Stephenson, J.,

This is an appeal from a judgment of conviction entered in the Highland County Court of Common Pleas, against appellants for aggravated trafficking of controlled substances (cocaine), in violation of R.C. 2925.04 (4) (2). Conviction was entered by the trial judge upon a plea of "no contest" to the charges, which plea was submitted after an unsuccessful motion to suppress evidence on the ground that it was obtained pursuant to an unconstitutional search and seizure. The issues on appeal relate solely to whether

the motion to suppress was properly denied, the issue remaining viable upon appeal pursuant to Crim. R. 12 (H).

The following facts are disclosed in the record. On February 19, 1977, a small private aircraft was forced to land at Highland County Airport due to weather conditions. In the plane were appellants, Charter and Keeley. They checked in for the night at the Greystone Motel located in Hillsboro in Highland County, and paid in advance for one night's lodging. The next morning at about 11:00 A.M., appellants left the motel by taxi, apparently enroute to the airfield. Shortly after they departed, an Edgar Postle, the motel keeper went to their room for the purpose of stripping the linens from the bed. Upon entering, the motel keeper observed a yellow plastic bag had been left behind. He removed the bag when he left the room, taking it to the laundry room where he could survey the articles therein to see if there was anything which they might want to repossess.

Upon surveying the contents, the motel keeper observed a variety of fresh fruit, a plastic bag of cereal, and a container of maple syrup. At the bottom of the bag was a "wrapped up plastic bag of a bundle of white material." Suspicious as well as curious, he investigated further, opening the bag and tasting the white substance. He was unable to identify the substance, but thought that it did not taste like a food substance. He then replaced the items in the bag. The motel keeper then phone the sheriff's department of Highland County and reported "Here's something you may be interested in, I don't know. . . It may be something you may not, so I'll leave it to you to decide."

Within a half hour, Deputy Sheriff Ayres arrived at the motel. In the interim between the call to the sheriff's department and the arrival of Deputy Ayres, appellant

Keeley twice called the Greystone Motel. On the first call she spoke to the motel keeper's wife. She reportedly inquired about whether the yellow plastic bag had been found. Unaware that her husband had already found and secured the bag, she stated something to the effect that she would have to talk to the maid. Shortly thereafter, appellant Keeley called the motel again, this time speaking to Mr. Postle. She then informed him that she had left the bag, inquired whether it had been found, and when told that he would check with the maid, she informed him that she was at the airport and would be in to claim the bag. The motel keeper responded "that's okay".

When Deputy Ayres arrived, Postle apparently related the essential details to Deputy Ayres, including how he found the bag, to whom it belonged, and the calls from the airport from the lady who was enroute to the motel to reclaim it. Deputy Ayres, in the presence of Postle, then removed and examined the contents of the bag, including the bundle of plastic bags with the white powder. He opened the bundle and removed one of the bags therein. He then replaced the bundle in the yellow plastic bag, and returned it to Postle. He then instructed Postle to return it to appellant Keeley when she returned to claim it. Deputy Ayres, then left the motel and drove to the sheriff's department for the purpose of field-testing the white powder he had removed from the bag. Prior to performing the chemical test, he was uncertain as to what the nature of the substance was. Subsequently, he positively identified the substance as cocaine.

Meanwhile, appellant Keeley reappeared at the motel and reclaimed the yellow plastic bag. She then returned to the airport.

Deputy Ayres, after chemically testing and identifying the substance, directed Deputy Cooper to proceed to the

airfield with Deputy Mahaffey to determine whether the plane had departed. When they arrived, the plane was taxiing to the spot from which it would make its takeoff run. The officers then drove to a position which blocked the path of the aircraft and stopped it. After obtaining their identification, the officers detained appellants while the information was related back to the sheriff's office for a record check on their identification. After approximately thirty minutes, the officers were directed to bring appellants in, and secure the aircraft. The officers then proceeded, with appellants, back to the sheriff's department. There, appellants were arrested and incarcerated.

Deputy Cooper was then dispatched to the Bureau of Criminal Investigation with the substance obtained at the motel by Deputy Ayres, for the purpose of chemical analysis. At the Bureau, the substance was analyzed as cocaine.

An application for a search warrant to search the aircraft was made by Deputy Ayres, and was quickly granted. Several officers then returned to the aircraft and executed the search warrant. Although the plastic yellow bag was seized, there was no cocaine therein.

The remainder of the cocaine was not located until the next day, when it was found at the sheriff's department, stashed between a radio console and wall, an area in which appellants were seated after being brought to the sheriff's office.

Appellants' sole assignment of error is the following:

> "The Court committed Prejudicial Error in Overruling Defendants-Appellants Motion to Suppress."

Specifically, appellants challenge the legality of the state's evidentiary use of the cocaine on two distinct grounds. First, appellants argue that the warrantless search and seizure of the packet by Deputy Ayres violated their Fourth

Amendment rights. Secondly, appellants contend that the search warrant issued on less than probable cause, and, therefore, also violated their Fourth Amendment rights.

As a preliminary matter, appellee argues that appellants are without standing to neither challenge the discovery of the nine bags of cocaine in the sheriff's office nor the bag of cocaine secured from Postle. We disagree. Appellants were charged with possessing all the cocaine, including that found at the sheriff's office.[1] Appellants had automatic standing because they were charged with possession of cocaine. The holding of *Simmons* v. *United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968), was that a defendant's testimony at a pre-trial hearing in support of standing is inadmissible at the trial on guilt or innocence. This holding has in many cases reduced the need for the automatic standing doctrine established in *Jone* v. *United States,* 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960). Simmons, itself, however, reaffirmed the doctrine, 390 U.S. at 390, 88 S.Ct. at 974. The state is precluded from asserting possession as an offense while asserting a lack of possessory interest to raise Fourth Amendment challenges. Even if the state is correct with respect to the nine bags, if the abandonment occurred because of prior improper Fourth Amendment action by the authorities, appellants would have derivative standing in that respect. See *Comm.* v. *Shoatz,* 366 A.2d 1216 (1976).

Since the nine bags were without question, under the

[1] This conclusion is unavoidable, since appellants are charged under the indictment with possessing three times the bulk amount of cocaine. R.C. 2925.03(A)(6). Bulk amount is 10 grams. R.C. 2925.01(E)(1). However, the single package obtained and tested by Deputy Ayres was found to be only 27 grams, three grams shy of three times the bulk amount. The inclusion of the contents of the other bags discovered in the Sheriff's office is, therefore, necessary to make out the possessory charge upon which appellants were convicted.

facts here, abandoned with the consequence of surrender of any right of privacy accorded by the Fourth Amendment, the pivotal issue, therefore, is the lawfulness of the search and seizure with respect to the acquisition of the remaining bag of cocaine by the deputy sheriff.

One of the grounds utilized by the trial court in overruling the motion to suppress was that the Fourth Amendment was inapplicable since the search was by a non-governmental officer. It has long been settled that the Fourth Amendment protects against unreasonable intrusions by the government, but not against the conduct of private individuals. *Burdeau* v. *McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed 1048 (1921); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971); *State* v. *Morris,* 42 Ohio St. 2d 307 (1975).

It is, likewise, equally settled that the federal rule of exclusion applies to lawless search where there is participation in the private search or the search is conducted upon the suggestion of the government. See authorities cited in *36 A.L.R. 3rd 553, 590, Sec. 9.*

There is no question that the initial seizure of the yellow bag and the examination of its contents by Postle, whether it be characterized as lawful or unlawful, were private acts on his part. Had Postle then delivered the bag to the sheriff's office there could be little question that it would be admissible at trial since such consensual transfer would not constitute a "seizure" within the proscription of the Fourth Amendment. *Coolidge* v. *New Hampshire, supra,* (403 U.S. 443); *U.S.* v. *Sherwin,* 539 F2d 1 (1976); *Caldwell* v. *U.S.,* 338 F2d 385 (1969); *Barnes* v. *U.S.,* 373 F2d 517 (1967); *U.S.* v. *Pryba,* 502 F2d 391 (1974).

However, under the facts here, the private person conducting the search contacted the authorities who responded. At this point, the cocaine had been replaced by Postle

joined in the search to fulfill an investigative function. Such a finding would convert the search from an exclusive private search into a joint venture between the police and the private individuals." Emphasis supplied

The majority opinion cites *Wolf Low* v. *U.S.*, 391 F.2d 61 (1968). In *Wolfe Low* the Ninth Circuit states, at page 63:

"As we analyze the case the custom officers made no search at all within the constitutional meaning of search. They were notified that if they would come to the airport responsible employees of the airport would show them something which the airport had on view there. They did not have to search for it nor obtain access to any closed container to see it."

Based on what I believe is the unambiguous holdings in the above cases, I must respectfully dissent.

IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY, OHIO

Case No. 348

State of Ohio
Plaintiff-Appellee,
vs.
John Charter, IV.
and
Linda Ann Keeley
Defendants-Appellants.

ENTRY

(Filed October 10, 1978)

This cause came on for hearing on defendants' notice of appeal, the transcript, assignment of error and briefs on behalf of the parties and oral arguments of counsel. The Court having considered the same, hereby overrules the assignment of errors and affirms judgment to all of which defendants' exceptions are hereby noted.

ENTER:
/s/ HOMER E. ADELE
Judge

APPROVED:
/s/ ROCKY A. COSS
Prosecuting Attorney
Attorney for Plaintiff-Appellee

/s/ H. LOUIS SIRKIN
Attorney for Defendant-Appellants

IN THE COURT OF COMMON PLEAS,
HIGHLAND COUNTY, OHIO

Case No. 77-Cr-9

STATE OF OHIO

vs.

JOHN CHARTER IV
AND
LYNDA ANN KEELEY

This court finds the following facts elicited from the transcript of the preliminary hearing and additional testimony on a Motion to Suppress to be true:

Both defendants Keeley and Charter registered in Greystone Motel Room 16 around 5:00 P.M. on February 20, 1977, and paid their bill in advance (which was required). The following morning the couple vacated the room around 11:00 and left the room key in the room, went to the office to pay for a telephone bill made the night before, and took a cab to the airport.

Around 11:30, the owner of the motel learning the couple had checked out and left for the airport went to the room, stripped the linens and carried them and a yellow plastic bag, which was left in the room, to the laundry. He checked the bag for valuables and happened on to the ten plastic bags which ultimately appeared suspicious to him. He tasted the material of one bag and found it not to be food and called the Sheriff's Office. Before the deputy arrived defendant Keeley called to inquire of the yellow plastic bag but didn't say she would

come for it. When the deputy arrived, Mr. Postle showed him his "find" and the deputy removed one of the ten small packages and took it with him. The remainder was returned to the yellow plastic bag along with the fruit and other items. Mr. Postle told the deputy that after he called the Sheriff's Office a telephone inquiry about the bag was made by a "Mrs. Charter". He asked the deputy what he should do should "Mrs. Charter" return to pick it up and the deputy advised him to give the bag to her. Defendant Keeley came to the motel shortly after noon for the yellow plastic bag and returned to the airport.

In the interim the deputy made a field test of the contents of the one small plastic bag and found it to be cocaine. Thereafter, both defendants were detained at the airport where they were in the process of leaving down the runway and they were placed in confinement at the Highland County Jail around 3:00 P.M. A search warrant was obtained around 3:45 P.M. and the plane was impounded and searched. An inventory was made of the items on the plane but no cocaine was found there. Several hours later around 7:30 P.M. nine small packages of cocaine were located behind the radio cabinet next to the wall in the Sheriff's Office where suspects waited to be booked.

This court finds that the Fourth Amendment is not applicable in this case. The evidence was seized and searched by a private individual not a law enforcement officer, nor his agent. The cases cited by the counsel for the defendant, i.e., 367 F 2nd 1 Corngold v. U.S. and 529 F 2nd 1365 U.S. v. Kelly are not applicable in our case at bar, as the search had been completed before the deputy was called. Furthermore, the search was not at the request of the officer nor with his assistance. He merely was called to view what Mr. Postle had already "searched."

This court further finds as a matter of fact, the seized material was abandoned. The room was paid for in advance, the key was left in the room, the phone bill was paid and as it turned out, the defendants had given up their room since they were leaving when the officer detained them. Mr. Postle had every reason at the time he "searched" the yellow bag to believe the parcel was abandoned. Merely because "Mrs. Charter" called later to claim the parcel does not alter the theory of abandonment at the time of the initial "search".

There appears to be no problem with the affidavit of Deputy Ayers. His information was based on that which the motel owner furnished who had personally identified the defendants and connected them with the packet of cocaine. The officer field tested the white powdery substance and found it to be cocaine. The affiant knew the defendants came in the plane to be searched and were going to leave in that same plane. These facts appear quite sufficient to enable the magistrate to draw a conclusion in a "neutral and detached manner" that probable cause did exist.

For the above reasons, the Motion to Suppress is overruled. Counsel for the State of Ohio shall prepare a journal entry reflecting the foregoing decision and shall forward said entry to this court for signature.

/s/ EVELYN W. COFFMAN, JUDGE

IN THE COURT OF COMMON PLEAS OF
HIGHLAND COUNTY, OHIO

Case No. 77-CR-9 & 77-CR-30

State of Ohio,

Plaintiff

vs.

John Charter, IV
and
Lynda Ann Keeley,

Defendants

ENTRY

This cause came on for hearing on the 9th day of May, 1977, before the Honorable Judge Evelyn W. Coffman setting by assignment on the matter of the Defendants' motion to suppress evidence on the ground that it was illegally obtained.

Upon consideration of the evidence submitted to the Court, including the transcript of the preliminary hearing and additional testimony offered at the hearing, the Court hereby rules that the Defendants' motion is not well taken for the reason set forth in the Opinion filed in this case on May 20, 1977, and the Court hereby overrules and denies said motion.

Enter .....
Judge

APPROVAL:

Counsel for the State
Rocky A. Coss, Prosecuting Attorney
Ronald J. O'Brien, Special Prosecutor
/s/ ROCKY A. COSS

Counsel for Defendants
H. Louis Sirkin and
Bernard Berkeman
/s/ H. LOUIS SIRKIN

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1257 (3)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or

where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Ohio Revised Code § 2925(A)(2)(6)

§ 2925.03 [Trafficking in drugs.]

(A) No person shall knowingly do any of the following:

* * *

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

* * *

(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount;

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SECOND REPLY TO PETITIONERS' QUESTIONS PRESENTED IN PETITION

ONCE EVIDENCE IS DISCOVERED BY A PRIVATE INDIVIDUAL PURSUANT TO A PRIVATE SEARCH WITHOUT POLICE INVOLVEMENT OF A BAG, WHO CALLS THE POLICE, THE PROPERTY OWNER DOES NOT REGAIN ANY FOURTH AMENDMENT PROTECTION BY THE PRIVATE INDIVIDUAL'S ACT OF REPLACING THE EVIDENCE IN THE BAG RATHER THAN TAKING IT TO THE AUTHORITIES OR LEAVING IT IN PLAIN VIEW IF HE INTENDED TO MAKE THE DISCOVERED EVIDENCE AVAILABLE TO THE AUTHORITIES.

Authorities Cited in Support of Second Reply to Petitioners' Questions Presented in Petition

United States v McDaniel, 574 F.2d 1224 (5th Cir., 1978) 7
United States v Blandton, 479 F.2d 327 8
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Constitutional and Statutory Provisions Cited:

Fourth Amendment, United States Constitution.....4,5,6,7,9,10
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STATEMENT OF FACTS

The relevant facts from the preliminary hearing transcript and the hearing on the suppression motion, briefly stated, will show that both petitioners registered at the Greystone Motel, Room 16, Hillsboro, Ohio, on February 19, 1977. Payment for one day was made in advance and check-out time was February 20, 1977, at 11:00 A.M. Edgar Postle was aware of a call from Room 16 the morning of the 20th of February requesting a cab. No payment for another day was made prior to 11:00 A.M. After the guests of Room 16 checked out, the manager of the motel, Mr. Postle, entered the room for cleaning purposes. The motel key was in the room. Mr. Postle found a bag abandoned in the room, removed the same and observed the contents. As a result, Mr. Postle notified the Highland County Sheriff. Mr. Postle's reason for calling the Sheriff's Office was that the package fit a pattern of what he had heard of contraband and drugs (Tr. - 12). *After* his initial search and the call to the Sheriff's Office, petitioner Keeley called the motel inquiring about the package. Deputy Carl Ayres went to the motel and observed the contents of the bag, such being ten separately wrapped plastic bags containing a white powdered substance. The deputy removed and retained one of the bags. In the meantime, after Mr. Postle's call to the Sheriff, the petitioner Keeley had called the motel, indicated that the bag had been left behind and that she was returning for it. The bag, including the remaining nine plastic bags, was returned to her by Mr. Postle. Deputy Ayres had returned to the Sheriff's Office and conducted a field test on the one bag, which was positive for cocaine.

Shortly thereafter, both petitioners were detained at the Highland County Airport in a 1968 Piper Cherokee airplane by Deputy Cooper. Deputy Cooper was fully aware of all the facts set forth above. A custodial search was not conducted at the time of this detention.

Both petitioners were transported to the Sheriff's Office and formally charged at 3:00 P.M. A search warrant was obtained for the airplane at 3:45 P.M. A search warrant was executed on the airplane. The airplane was impounded and secured.

Various items listed on the inventory of the search warrant were removed from the airplane and taken from the cold, snowy airfield to the Sheriff's Office. The nine packages of cocaine were not found in the aircraft.

Several hours later, nine plastic bags containing a white powdered substance were found by Deputy Rayburn secreted in a crevice behind a counter in the Sheriff's Office in an area where suspects await booking.

A preliminary hearing was held on February 25, 1977; probable cause was found, and both petitioners were bound over to the Grand Jury.

Both petitioners were indicted by the Highland County Grand Jury for two counts of Aggravated Trafficking, in violation of Section 2925.03(A)(6) O.R.C., Possession of More than Three Times the Bulk Amount of a Schedule II Controlled Substance, Cocaine, and violation of Section 2925.03(A)(2) O.R.C., Transportation of Controlled Substance for Resale. Petitioner Charter was indicted for Permitting Drug Abuse, in violation of Section 2925.13 O.R.C.

Both petitioners entered not guilty pleas to all counts at arraignment and were released on bond pending trial.

Petitioners filed a motion to suppress physical evidence. Judge Coffman, sitting by Ohio Supreme Court assignment, heard such motion on May 9, 1977. The Court overruled such motion by written decision and entry.

On June 24, 1977, both petitioners, while represented by counsel, withdrew their not guilty pleas and entered a no contest plea to count one of the indictment, that being the possessory count set forth above. The remaining counts were dismissed by way of nolle presequi.

At that time, the State moved to admit the preliminary hearing transcript, the transcript of the motion to suppress, and the nine packages of cocaine found in the Sheriff's Office. It is essential to note that none of the items taken from the aircraft pursuant to the search warrant were used as evidence against petitioners in establishing the factual basis for the plea or as a basis for Judge Hottle's subsequent finding of guilt upon such plea.

Petitioners were found guilty based upon that plea and the facts submitted. Petitioners were both sentenced to three to fifteen years, with actual incarceration of three years. Both were released on an appeal bond.

A timely notice of appeal was filed and hearing held before the Court of Appeals for the Fourth District affirmed the conviction by a two to one vote on September 20, 1978.

Petitioners filed a timely notice and motion for leave to appeal to the Ohio Supreme Court. On January 17, 1979, the Ohio Supreme Court overruled the petitioners' motion for leave to appeal.

REPLY TO PETITIONERS' QUESTIONS PRESENTED IN PETITION

First Reply to Petitioners' Questions Presented in Petition

Where a private individual owner of a motel, while cleaning a room presently vacated by the occupants finds a bag left in the room by those former occupants and the private individual, without any involvement of law enforcement officers, opens the bag, removes and inspects its contents, discovers ten bags of what he suspects might be contraband or narcotics, replaces them in the bag, calls the law enforcement officers and invites them to come to the hotel to inspect the bag and its contents, and a deputy sheriff thereafter comes to the hotel and removes the ten bags, takes one bag for analysis, such facts constitute a private search by a private individual of abandoned property which is not subject to the proscriptions of the Fourth Amendment and the subsequent acts of the officer in investigating after invited by the private individual motel owner is not a search proscribed by the Fourth Amendment.

Second Reply to Petitioners' Questions Presented in Petition

Once evidence is discovered by a private individual pursuant to a private search without police involvement of a bag and calls the police, the property owner does not regain any Fourth Amendment protection by the private individual's act of replacing the evidence in the bag rather than taking it to the authorities or leaving it in plain view if he intended to make the discovered evidence available to the authorities.

ARGUMENT

First Reply to Petitioners' Questions Presented in Petition

Since both of respondent's replies to petitioners' questions presented in petition concern the same fundamental issues, they are consolidated herein for the purposes of argument.

The respondent herein, the State of Ohio, submits that the acts of the motel owner and later of the deputy sheriff, did not constitute a violation of the Fourth Amendment for the reason that the property at the time of its discovery by the owner of the motel and his search of the bag and removal of the contents, including the ten bags of what were later identified as cocaine, was purely a private search by a private individual, which is not subject to the proscriptions of the Fourth Amendment. The respondent further submits that the motel owner in turning the bag over to the deputy sheriff after he had called the Sheriff's office and invited them out, was also proper and the deputy sheriff's inspection of the bag at the motel office did not constitute a new search subject to the Fourth Amendment thereby requiring him to obtain a warrant before searching it.

The petitioners have conceded that the motel owner, in searching the bag and removing its contents which turned out to include ten small bags of cocaine, was solely on his own and without any governmental involvement (Page 8 of petitioners' memorandum). However, the petitioners have attempted to construct a new and heretofore judicially rejected Fourth Amendment claim that once the motel owner invited the officer to come to the motel to inspect the bag's contents for possible contraband, that the later inspection, solely because the motel owner replaced the items in the bag, that the deputy sheriff was required to obtain a search warrant before inspecting the bag.

It has long been the law of the land, beginning with the case of *Burdeau v McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921), that the Fourth Amendment does not apply to searches by private individuals. This Court recognized this in the case of *State v Morris*, 42 O.S.2d 307 (1975). Furthermore, discovery of contraband by a private individual which is turned over to the police is totally permissible and may be used against the defendant involved, *United States v Barnes*, 373 F.2d 577 (5th Cir., 1967), *United States v DeBerry*, 487 F.2d 448, 450 (2nd Cir., 1973), *United States v Pryba*, 502 F.2d 391, 401 (D.C. 194), *United States v Ford*, 525 F.2d 1308, 1312 (10th Cir., 1975). In *United States v Issod*, 508 F.2d 990, (7th Cir., 1974), the Court stated at page 994:

> "if the freight agent could lawfully open the trunk, he could also, upon discovering the contraband, lawfully notify the law enforcement authorities of his discovery and show it to the state officers."

Clearly, in this case, the motel owner, upon discovering what he felt fit a pattern of what he had heard regarding contraband and drugs (Tr. - 12), called the deputy sheriff for the purpose of allowing him to view it. Thus, he was making available to law enforcement authorities the fruit of his private, nongovernmental search. Judge Stephenson, in his majority opinion for the Court of Appeals, correctly noted that the motel owner intended to make available to the deputy the results of his search (Page 6 of opinion), and the deputy's examination at the motel (although involving removal of the plastic bags which had been repacked by the motel owner) "was merely confirmatory of the initial search and was suggested by and related to the search by Postle."

Second Reply to Defendants-Appellants' Question Presented in Petition

Defendants-appellants submit that the deputy conducted a new search when he inspected the bag, which was a violation of the Fourth Amendment as it was warrantless. Again, as correctly noted by the Court of Appeals at page 7 of its opinion:

> "Since the initial search and seizure was by a private person, was completed and the bag repacked, a subsequently warrantless examination of the evidence already found, if it required, as here, unpacking the bag, does not render the evidence inadmissible, *Wolf Low v United States*, 391 F.2d 61 (1968), *United States v Berger*, 355 F.Supp 919, (1973), *Comm v Kozak*, 336 A.2d 387 (1975).

This is the only logical interpretation of a case of the type. Had the motel owner not repacked the bag, clearly the petitioners could claim no Fourth Amendment violation and it likewise is immaterial that the motel owner herein repacked the bag before showing it to the deputy. The crucial factor, as previously noted, is whether once the private individual conducts a search and notifies the law enforcement officers to make the evidence available, what he does with it is immaterial.

This has been recognized by federal courts in the case of *United States v McDaniel*, 574 F.2d 1224 (5th Cir., 1978), a briefcase was misrouted by an airline. An employee of the airline opened the briefcase and discovered what he suspected were narcotics. He *resealed the briefcase* and called the police who came to the office and reopened and inspected the contents of the briefcase. The defendant argued, as do petitioners herein, that the governmental agents should have first secured a search warrant. The Court rejected this contention citing the

case of *United States v Blandton*, 479 F.2d 327. In the case of *United States v Bomengo*, 580 F.2d 173 (5th Cir., 1978), the same court considered the following facts: An engineer at an apartment complex entered an apartment to investigate a water leak, accompanied by the apartment's security director. Police were called to the apartment when the security director observed two guns in plain view. The court ruled that the police view subsequent to the initial detection was not a search since it was confined only to the scope of the observation of the security director. That was the case here, where the deputy merely viewed what the motel owner had already found and invited him to inspect. Other cases supporting this are *United States v Crabtree*, 545 F.2d 884 (4th Cir., 1977) and *United States v Lamar*, 545 F.2d 488 (5th Cir., 1977).

Again, as noted by the Court of Appeals, the deputy's actions were merely confirmatory. No new search of other property was made by the deputy.

The petitioners submit several cases in support of their proposition that the deputy's action was an unconstitutional search. However, all of these cases are distinguished from the facts and actions herein. In the case of *United States v Haes*, 551 F.2d 767 (8th Cir., 1977), the search was *not completed* by a private individual but assisted by law officers who helped remove alleged pornographic or obscene films which were put in projectors and viewed by officers before they were seized. Furthermore, courts have consistently applied different constitutional criteria for obscenity due to the First Amendment considerations, *Roaden v Kentucky*, 413 U.S. 496 (1973). The cases of *United States v Sherwin*, 539 F.2d 1 (9th Cir., 1976) and *United States v Kelley*, 529 F.2d 1371 (8th Cir., 1975) also involved obscene materials, not drugs. Finally, the cases of *United States v Newton*, 510 F.2d 1149 (7th Cir., 1975) and *Corngold v United States*, 367 F.2d 1 (9th Cir., 1966), both involved searches conducted by private individuals *at the request of the government*, for government purposes or with

Keeley twice called the Greystone Motel. On the first call she spoke to the motel keeper's wife. She reportedly inquired about whether the yellow plastic bag had been found. Unaware that her husband had already found and secured the bag, she stated something to the effect that she would have to talk to the maid. Shortly thereafter, appellant Keeley called the motel again, this time speaking to Mr. Postle. She then informed him that she had left the bag, inquired whether it had been found, and when told that he would check with the maid, she informed him that she was at the airport and would be in to claim the bag. The motel keeper responded "that's okay".

When Deputy Ayres arrived, Postle apparently related the essential details to Deputy Ayres, including how he found the bag, to whom it belonged, and the calls from the airport from the lady who was enroute to the motel to reclaim it. Deputy Ayres, in the presence of Postle, then removed and examined the contents of the bag, including the bundle of plastic bags with the white powder. He opened the bundle and removed one of the bags therein. He then replaced the bundle in the yellow plastic bag, and returned it to Postle. He then instructed Postle to return it to appellant Keeley when she returned to claim it. Deputy Ayres, then left the motel and drove to the sheriff's department for the purpose of field-testing the white powder he had removed from the bag. Prior to performing the chemical test, he was uncertain as to what the nature of the substance was. Subsequently, he positively identified the substance as cocaine.

Meanwhile, appellant Keeley reappeared at the motel and reclaimed the yellow plastic bag. She then returned to the airport.

Deputy Ayres, after chemically testing and identifying the substance, directed Deputy Cooper to proceed to the

airfield with Deputy Mahaffey to determine whether the plane had departed. When they arrived, the plane was taxiing to the spot from which it would make its takeoff run. The officers then drove to a position which blocked the path of the aircraft and stopped it. After obtaining their identification, the officers detained appellants while the information was related back to the sheriff's office for a record check on their identification. After approximately thirty minutes, the officers were directed to bring appellants in, and secure the aircraft. The officers then proceeded, with appellants, back to the sheriff's department. There, appellants were arrested and incarcerated.

Deputy Cooper was then dispatched to the Bureau of Criminal Investigation with the substance obtained at the motel by Deputy Ayres, for the purpose of chemical analysis. At the Bureau, the substance was analyzed as cocaine.

An application for a search warrant to search the aircraft was made by Deputy Ayres, and was quickly granted. Several officers then returned to the aircraft and executed the search warrant. Although the plastic yellow bag was seized, there was no cocaine therein.

The remainder of the cocaine was not located until the next day, when it was found at the sheriff's department, stashed between a radio console and wall, an area in which appellants were seated after being brought to the sheriff's office.

Appellants' sole assignment of error is the following:

> "The Court committed Prejudicial Error in Overruling Defendants-Appellants Motion to Suppress."

Specifically, appellants challenge the legality of the state's evidentiary use of the cocaine on two distinct grounds. First, appellants argue that the warrantless search and seizure of the packet by Deputy Ayres violated their Fourth

Amendment rights. Secondly, appellants contend that the search warrant issued on less than probable cause, and, therefore, also violated their Fourth Amendment rights.

As a preliminary matter, appellee argues that appellants are without standing to neither challenge the discovery of the nine bags of cocaine in the sheriff's office nor the bag of cocaine secured from Postle. We disagree. Appellants were charged with possessing all the cocaine, including that found at the sheriff's office.[1] Appellants had automatic standing because they were charged with possession of cocaine. The holding of *Simmons* v. *United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968), was that a defendant's testimony at a pre-trial hearing in support of standing is inadmissible at the trial on guilt or innocence. This holding has in many cases reduced the need for the automatic standing doctrine established in *Jone* v. *United States,* 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960). Simmons, itself, however, reaffirmed the doctrine, 390 U.S. at 390, 88 S.Ct. at 974. The state is precluded from asserting possession as an offense while asserting a lack of possessory interest to raise Fourth Amendment challenges. Even if the state is correct with respect to the nine bags, if the abandonment occurred because of prior improper Fourth Amendment action by the authorities, appellants would have derivative standing in that respect. See *Comm.* v. *Shoatz,* 366 A.2d 1216 (1976).

Since the nine bags were without question, under the

[1] This conclusion is unavoidable, since appellants are charged under the indictment with possessing three times the bulk amount of cocaine. R.C. 2925.03(A)(6). Bulk amount is 10 grams. R.C. 2925.01(E)(1). However, the single package obtained and tested by Deputy Ayres was found to be only 27 grams, three grams shy of three times the bulk amount. The inclusion of the contents of the other bags discovered in the Sheriff's office is, therefore, necessary to make out the possessory charge upon which appellants were convicted.

facts here, abandoned with the consequence of surrender of any right of privacy accorded by the Fourth Amendment, the pivotal issue, therefore, is the lawfulness of the search and seizure with respect to the acquisition of the remaining bag of cocaine by the deputy sheriff.

One of the grounds utilized by the trial court in overruling the motion to suppress was that the Fourth Amendment was inapplicable since the search was by a non-governmental officer. It has long been settled that the Fourth Amendment protects against unreasonable intrusions by the government, but not against the conduct of private individuals. *Burdeau* v. *McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed 1048 (1921); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971); *State* v. *Morris,* 42 Ohio St. 2d 307 (1975).

It is, likewise, equally settled that the federal rule of exclusion applies to lawless search where there is participation in the private search or the search is conducted upon the suggestion of the government. See authorities cited in *36 A.L.R. 3rd 553, 590, Sec. 9.*

There is no question that the initial seizure of the yellow bag and the examination of its contents by Postle, whether it be characterized as lawful or unlawful, were private acts on his part. Had Postle then delivered the bag to the sheriff's office there could be little question that it would be admissible at trial since such consensual transfer would not constitute a "seizure" within the proscription of the Fourth Amendment. *Coolidge* v. *New Hampshire, supra,* (403 U.S. 443); *U.S.* v. *Sherwin,* 539 F2d 1 (1976); *Caldwell* v. *U.S.,* 338 F2d 385 (1969); *Barnes* v. *U.S.,* 373 F2d 517 (1967); *U.S.* v. *Pryba,* 502 F2d 391 (1974).

However, under the facts here, the private person conducting the search contacted the authorities who responded. At this point, the cocaine had been replaced by Postle

in the yellow bag and the deputy was aware that the bag was not abandoned as Postle might at first have reasonably surmised. The focus then is whether the act of the deputy in removing the items in the bag to secure the cocaine in the bottom and the taking of the one bag of cocaine constituted a new and independent police search and seizure requiring Fourth Amendment compliance. We conclude it did not. It is apparent that Postle intended to make available the results of his search of the yellow bag seized by him from the room in his possession to the authorities. The examination by the deputy was merely confirmatory of the initial search and was suggested by and related to the search by Postle. Appellants' expectation of privacy, if it was violated, was by Postle and not the deputy. We deem it of no constitutional significance that the items on top of the cocaine, under these circumstances, was lifted by the deputy rather than Postle.

Since the initial search and seizure was by a private person, was completed and the bag repacked, a subsequently warrantless examination of the evidence already found, even if it required, as here, unpacking the bag, does not render the evidence inadmissible. *Wolf Low* v. *U.S.*, 391 F.2d 61 (1968); *U.S.* v. *Berger*, 355 F.Supp. 919 (1973); *Comm.* v. *Kozak*, 336 A.2d 387 (1975). The fact that at the time the deputy took the one bag he may or may not have had probable cause, is immaterial since the Fourth Amendment was inapplicable. Likewise, the fact that the yellow bag and its contents were not, in fact, abandoned is not controlling since a search and seizure by a private person is not dependent upon its characterization as lawful or unlawful.

Complaint is further made by appellants as to the sufficiency of the affidavit for a search warrant. Since nothing incriminatory was discovered upon execution of the war-

rant, no prejudice resulted even if the warrant affidavit was insufficient. We do not, therefore, further consider such claim.

In light of the above we hold the trial court properly overruled the motion to suppress and affirm the judgment of conviction.

JUDGMENT AFFIRMED

Abele, P.J., Concurs:
Grey, J., Dissents:

STATE vs. CHARTER & KEELEY, No. 348, Highland County

GREY, J. DISSENTING:

I dissent. Oddly enough my dissent relies on the same authority cited by the majority opinion to reach the opposite conclusion. The majority for example cites *Coolidge* v. *New Hampshire*, 403 U.S. 443. Yet the holding in *Coolidge* v. *New Hampshire* is that warrantless searches are unreasonable per se; that constitutional provisions for the security of persons and property should be liberally construed. The court notes that there are exceptions but that "in considering them, we must not lose sight of the Fourth Amendment's fundamental guarantee."

The facts in this case lead to but two conclusions: 1. that the motel owner, Postle, conducted a search, seized what he believed to be contraband, called the police in order to deliver to them the suspect material, or 2. that Postle, finding what he believed to be contraband, contacted police in order for them to investigate and make a determination as to the seizure of the property. If the former is true, then there is no Fourth Amendment question. *Burdeau* v. *McDowell*, supra. If the latter is true,

then this was a search and seizure by a private individual in conjunction with police action and was in violation of the Fourth Amendment.

Based on the testimony of Postle we cannot reach the majority's conclusion.

Postle testified as follows:

> *"Well, I called the Sheriff's Office and 'Here's something you may be interested in, I don't know.' * * * It may be something you may not, so I'll leave it to you to decide."*

We note that in this case the police officer was called to join in the search of what was known by both the police officer and Postle not to be abandoned property but the personal effects of one of his guests who was returning to claim it. We further note here that Postle had no idea as to what the suspicious substance was. He had conducted his search and determined that it might be contraband. He did not at that time turn the suspicious package over to the police officer but rather requested the officer to conduct a search of the bag and examine the material.

The majority also cites the case of *State* v. *Morris*, 42 Ohio St.2d 307. In that case the officials of a railroad company became concerned about a suitcase left in their baggage claim section and decided to search it themselves and requested the aid of police officers in opening the suitcase. The court held that the search was conducted by the railroad employees and that when the suitcase was opened contraband came into view. The majority opinion holds that the fact that the deputy sheriff conducted his own search is of no constitutional significance and yet cases cited for authority are absolutely contradictory to that position. For example, in *State* v. *Morris* the majority opinion places great weight on the fact that the police were not

present for the purpose of investigation and did not search the suitcase. At page 320:

> *"* * * The record is void of any evidence that the police had prior knowledge of the existence of contraband and their 'intrusion' into the suitcase was not '* * * with the specific intent of discovering evidence of a crime * * *.' Cady* v. *Dombrowski (1973), 413 U.S. 433, 442, fn., 93 S.Ct. 2523, 2528, 37 L.Ed. 2d 706."*

Again at page 324:

> *"For the last time, the Toledo police not only did not break into the suitcase, they did not even open it."*

This is not the situation in the case we are deciding. The police officer did open the bag and search it. Postle, the motel owner, was calling upon the police officer to conduct a search and if his opinion so warranted, a seizure. We believe the language in the dissenting opinion in *State* v. *Morris* is particularly on point. Citing *Byars* v. *U.S.*, 273 U.S. 28, 71 L.Ed. 520, 47 S.Ct. 248, (1927), we have:

> *"The Byars case counsels that if police are present when private citizens conduct an unlawful search, the determinative issue in resolving whether constiutional restrictions are applicable is the character of the police presence. If the police were present primarily upon the chance that something of official interest might be discovered, compliance with the Fourth Amendment is required.*
>
> *One reason given by the majority to support its conclusion that the October 28th search was a private search is the fact that the search 'was instigated by private individuals, for private purposes * * *.' However, the mere fact that the police do not initiate a search does not preclude a finding that the police*

joined in the search to fulfill an investigative function. Such a finding would convert the search from an exclusive private search into a joint venture between the police and the private individuals." Emphasis supplied

The majority opinion cites *Wolf Low* v. *U.S.*, 391 F.2d 61 (1968). In *Wolfe Low* the Ninth Circuit states, at page 63:

> *"As we analyze the case the custom officers made no search at all within the constitutional meaning of search. They were notified that if they would come to the airport responsible employees of the airport would show them something which the airport had on view there. They did not have to search for it nor obtain access to any closed container to see it."*

Based on what I believe is the unambiguous holdings in the above cases, I must respectfully dissent.

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.